

March 19, 1997

VIA FACSIMILE

Commissioner Michal C. Moore  
Commissioner Jananne Sharpless  
Commissioner Sally Rakow  
Commissioner David A. Rohy  
Commissioner Robert A. Laurie  
California Energy Commission  
1516 Ninth Street,  
Sacramento, CA 95814

Re: Oxbow Power Group's Response To "Policy Report On AB 1890 Renewables  
Funding"

Dear Commissioners Moore, Sharpless, Rakow, Rohy and Laurie:

Oxbow Power Group ("Oxbow") has been an active participant in this Commission's Renewables Docket 96-REN-1890. Oxbow has sent a representative to speak at every relevant Committee Workshop and has submitted three sets of written comments proposing an appropriate renewables certification program, consistent with the Federal Energy Regulatory Commission's ("FERC") renewables certification policies.

In its pleadings and oral presentations, Oxbow has provided this Commission with compelling evidence that one of Oxbow's geothermal facilities ("Oxbow Geothermal") should qualify as "in-state" for purposes of competing for AB 1890 funding. FERC has certified Oxbow Geothermal's California facilities as "qualifying facilities" ("QF") which comprise "an integral and necessary component of its qualifying small power production facility..." 43 FERC ¶ 61,286, 61,782. Additionally, Oxbow Geothermal pays California property taxes based on the physical presence of its QF facilities within several California counties. Finally, as we stated at the Committee's February 27 hearing, the Report's own statistics quantifying "California's In-State

Renewable Capacity" for 1996 include Oxbow Geothermal's production. See Figure 1-1, Report at 4 (emphasis added).

Despite Oxbow's repeated presentation of this evidence in its oral and written comments to this Commission, the Report arbitrarily defines "in-state" to purposely and singularly exclude Oxbow Geothermal from eligibility to compete for the various funding mechanisms AB 1890 offers to California renewable resource providers.

For the reasons set forth in Oxbow's February 26 written comments (which are attached to this letter) the Report's arbitrary definition of "in-state" should be rejected.

Oxbow will not participate in the Commission's March 20, 1997 Commission Hearing to raise this issue again. It is unfortunate that a renewable producer dedicated to making this Commission's renewable policies a reality and historically considered a California facility by this Commission could now fall prey to such an irrational and arbitrary exclusion.

Oxbow appreciates your attention to this matter. Please call if you have any questions or comments regarding the foregoing.

Very truly yours,

TRACI BONE  
DAVIS WRIGHT TREMAINE  
Attorneys for Oxbow Power Group

**ATTACHMENT**

**STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

Implementation of Restructuring	)	Docket No. 96-REN-1890
Legislation (Chapter 854, Statutes	)	
of 1996, AB 1890): Renewables	)	
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**OXBOW POWER GROUP COMMENTS ON THE  
COMMITTEE DRAFT POLICY REPORT ON AB 1890 RENEWABLE FUNDING**

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February 26, 1997

## I. INTRODUCTION

The Committee Draft Policy Report on AB 1890 Renewables Funding ("Draft") arbitrarily, without legislative support or logic, and devoid of any discernible policy, defines "in-state" to purposely and singularly exclude one long-recognized California qualifying facility ("QF") from eligibility to compete for the various funding mechanisms AB 1890 offers to California renewable resource providers. Oxbow Power Group ("Oxbow Power") submits the following comments to necessarily protest the Draft's unwarranted twisting of the in-state requirements of AB 1890.<sup>1</sup>

Oxbow Power's two geothermal facilities that sell power into California are QFs, in full compliance with the Federal Energy Regulatory Commission's ("FERC") QF requirements. See 18 C.F.R. Part 292, subpart B (1996). The FERC has appropriately determined that one of Oxbow Power's QFs (referenced here as "Oxbow Geothermal")<sup>2</sup> specifically includes as "an integral and necessary component of its qualifying small power production facility" the "transmission line which connects Oxbow [Geothermal] to its purchasing utility, Southern

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<sup>1</sup> A description of Oxbow Power's worldwide and domestic development of geothermal resources is provided in Oxbow Power's Comments filed in this docket January 21, 1997.

<sup>2</sup> Significantly, Oxbow Power's other QF facility is also located within Nevada and delivers its power to Edison over Sierra Pacific Power Company's transmission lines. However, in contrast to Oxbow Geothermal, the transmission lines which deliver this project's power into California for sale to Edison are not owned by the project and have not been determined to be "necessary to the operation of and integral to Oxbow's qualifying facility." 43 FERC ¶ 61,286, 61,783 (1988). Consequently, Oxbow Power makes no claim that this facility is a California QF eligible for AB 1890 renewable funding.

California Edison Company ..." 43 FERC ¶ 61,286, 61,782. The FERC accordingly and necessarily exempted Oxbow Geothermal from regulation as a transmitting utility. See Oxbow Geothermal Corporation, 43 FERC ¶ 61,286, 61,783 (1988) ("Oxbow Geothermal").

Ignoring FERC's prior determination, the Draft would remove California status from Oxbow Geothermal on the unprecedented and unsupported grounds that "generating facilities located outside California with transmission lines in California" (Draft at 43) have ceased being physically located within the State. Only a most contrived distortion of AB 1890 could lead to this conclusion. Moreover, no conceivable policy grounds exist to deny eligibility to Oxbow Geothermal to compete with other California renewable resource providers for AB 1890 funding.

## **II. THE DRAFT'S MISINTERPRETATION OF THE IN-STATE REQUIREMENTS DISTORTS THE STATUTORY LANGUAGE**

Contrary to the Draft, AB 1890 does not require a renewable energy producer to have generation facilities in California as an absolute precondition to certification. It only requires that there be "in-state operation" by the renewable producer. §§ 381(b)(3) and (c)(3).

The "linchpin" of the Draft "analysis" is the contrived logic that the statutory phrase "operation of technologies" "would appear to indicate that it is the generation which is intended to be 'in-state' rather than the resource." Draft at 43 (emphasis added).

No legislative nor logical basis "would appear to indicate" support for, let alone sustain, the Draft's determination that the phrase "operation of technologies" was intended to deny eligibility to renewable QFs whose California nexus is their transmission facilities.

### **III. THE DRAFT MISCONSTRUES AND EXAGGERATES THE IMPACT OF CERTIFYING CALIFORNIA QFs LIKE OXBOW GEOTHERMAL**

Underlying the Draft's otherwise inexplicable exclusion of Oxbow Geothermal from California status is its apparent fear that to do so would grant eligibility to huge armies of out-of-state renewable producers, thereby increasing costs and engendering administrative chaos:

These restrictions [discriminating against California QFs with transmission lines within California] ... [make it] easier to certify the location of a particular power plant and that electricity was generated by that plant, than to track and account for the fuel or renewable resource that might be combined with "non-California fuels" in a power plant ..." Id.

The Draft inappropriately lumps Oxbow Geothermal into the same category as hypothetical projects with no QF facilities in California, such as the "Arizona tire-burner" or the "Kansas wind farm." The Arizona tire-burner seeks certification to sell power in California from a facility located in Arizona that would produce power from tires (i.e. resources) gathered in California. The Kansas wind producer hopes to sell electricity in California by wheeling its power across utility-owned transmission lines. Classifying Oxbow Geothermal with these projects is completely inappropriate for a project with FERC-certified QF facilities within California - a qualification that the Arizona tire-burner and similar facilities could never obtain.

First, accepting FERC's determination that Oxbow Geothermal's California transmission line is an "integral and necessary component" to the operation of its facility will not permit countless out-of-state renewable producers to qualify for AB 1890 funding. The Draft fails to

distinguish between out-of-state producers whose power is delivered into California via utility-owned transmission lines, and the rare and unique situation presented by Oxbow Geothermal.<sup>3</sup>

Second, certifying Oxbow Geothermal for AB 1890 funding does not assure that it will receive any financial assistance. Oxbow Geothermal is simply requesting the right to compete with other California renewable resource providers for the available funding for which it qualifies.

Third, participation by Oxbow Geothermal in AB 1890's programs will not increase administrative costs. The accounting and commingling fears motivating the Draft are not, have not been, and simply cannot be, germane to the situation presented by Oxbow Geothermal. All the power on the Oxbow Geothermal line is generated from a FERC-certified geothermal QF and is delivered directly to Edison. There is no greater chance of commingling renewable and non-renewable power on the Oxbow Geothermal transmission line than there is on any other interconnection which delivers power from the QF to the purchasing utility. In contrast, if the Draft permitted out-of-state QFs to deliver power into California on utility common carrier transmission facilities, it might appropriately have concerns regarding the commingling of renewable and non-renewable power.

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<sup>3</sup> The Draft would certify a project with generation facilities in California, but selling power outside of California - thus contorting the ultimate goal of AB 1890 to support renewable resources by making them available to California consumers.



#### **IV. DENYING OXBOW GEOTHERMAL CALIFORNIA IN-STATE STATUS IS PATENTLY INEQUITABLE AND INCONSISTENT WITH PRIOR COMMISSION POLICY DETERMINATIONS**

The Draft fails to acknowledge or attempt to reconcile its "in-state" determination with the fact that California taxing authorities insist that Oxbow Geothermal is per se in-state.<sup>4</sup>

"Taxation without representation" is no more acceptable today than it was in the eighteenth century.

Compounding the unfairness is that this Commission has heretofore unquestionably characterized Oxbow Geothermal's generation as an in-state resource. In fact, the Draft's Figure 1-1 (p.4) quantifies "California's In-State Renewable Capacity, 1996" as including 885 MW of "QF Geothermal" capacity. This calculation specifically and appropriately includes the Oxbow Geothermal facility, which the Draft then inconsistently classifies as "out-of-state" for certification purposes.

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<sup>4</sup> In its January 21 Comments (pp. 5-6), Oxbow Power quantified and documented the millions of dollars it has paid and will continue to pay California state and local taxing agencies because of Oxbow Geothermal's indisputable physical presence within California.

**V. THIS COMMISSION MAY NOT LAWFULLY CONTRAVENE FERC'S DETERMINATION THAT OXBOW GEOTHERMAL IS LOCATED IN CALIFORNIA**

If one thing is clear, from both the express language of AB 1890<sup>5</sup> and the oral testimony given during the workshops in this proceeding,<sup>6</sup> it is that the Legislature intended renewables with QF facilities in California to be eligible to compete for the renewables benefits of AB 1890.<sup>7</sup>

Exclusion of Oxbow Geothermal from the renewables benefits of AB 1890 on the grounds that it is not "in-state" would contravene FERC's determination that Oxbow Geothermal has California QF facilities and thus contradict AB 1890's intent to benefit California QFs. See Oxbow Geothermal. This Commission must give great deference to the FERC's determination because it has "exclusive authority over QF status determinations." Independent Energy Producers Ass'n v. California Pub. Utils. Comm'n, 36 F.3d 848, 853-854 (9th Cir. 1994) ("IEP").

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<sup>5</sup> It is more than an inadvertent coincidence that AB 1890 contains the same 25% fossil fuel limitation as FERC's small power producer (renewable) criteria. Compare 18 CFR § 292.204(b)(2) to AB 1890's § 381(c)(3).

<sup>6</sup> Several participants at the November 5, 1996 Commission Workshop commented that they understood the Legislature to intend that FERC-certified QFs would automatically qualify as renewable resource providers for AB 1890 purposes.

<sup>7</sup> The Draft does recognize and seek legislative guidance regarding whether California may discriminate between renewable resource providers located within and outside of the State. Draft at 18. The constitutional infirmities of this intended discrimination are set forth at pages 6-11 of the Oxbow Power January 21 Comments.

Oxbow Geothermal is not presently challenging its exclusion on constitutional grounds. Its arguments rest presently on the compelling factual, equitable, and legal grounds establishing its as a bona fides California renewable energy provider. If this Commission continues to deny Oxbow Geothermal its California citizenship, it may likely consider expanding the scope of its challenge to this baseless denial of its rights.

In IEP, the Court struck down the California Public Utility Commission's ("CPUC") QF monitoring program on the grounds that the CPUC was inappropriately seeking to make independent QF status determinations - an area which Congress delegated to the exclusive province of FERC.

## **VI. CONCLUSION**

For all the foregoing reasons, Oxbow Power urges the Committee to reject the Draft's unsupported and inexplicable exclusion of Oxbow Geothermal from definition of California renewable resource providers eligible to compete for AB 1890 renewable resource funding.<sup>8</sup> AB 1890 does not even "appear to indicate" the need for such a purposeful and singular exclusion. Contrary to the suggested paranoia of the Draft, recognizing Oxbow Geothermal as a California renewable resource will not open Pandora's Box. Granting Oxbow Geothermal its rights as a California citizen would be consistent with the prior actions of this Commission and the California taxing authorities.

Alternatively, if the Committee remains uncertain of the Legislature's intended meaning of the term "in-state" in AB 1890, it should, at a minimum, defer from excluding potential eligible California renewable QFs, such as Oxbow Geothermal, based on what it surmises the statutory

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<sup>8</sup> The Industry Proposal, which is unopposed on this point, supports an "automatic certification" procedure for QFs, based upon FERC rules, which would permit certification of Oxbow Geothermal: "A facility certified under 18 CFR § 292.204 as a small power production qualifying facility and having facilities within California should automatically qualify as a 'renewable resource technology'." See "Comments of the American Wind Energy Association,

language "would appear to indicate" and rather, request additional legislative guidance on this issue.

Respectfully submitted by:

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Dated: February 26, 1997

(...continued)

California Biomass Energy Alliance, Geothermal Energy Association for the November 19, 1996 Renewables Program Committee Workshop" at 4.